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Adenan bin Haron v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–240–08 OF 2011
LINTON ALBERT, DAVID WONG AND ZAKARIA SAM JJCA
7 APRIL 2014

C *Criminal Law — Dangerous drugs — Trafficking — 7,587g of cannabis — Conviction and sentence — Appeal against — Accused persons caught in a house with drugs — Whether appellant had exclusive possession of drugs — Whether prosecution case proven beyond reasonable doubt — Whether prima facie case proven — Appellant's conduct leading to discovery of hidden drugs* D *— Statutory caution not given to appellant — Whether evidence amounted to inadmissible confession — Whether without appellant's confession by conduct prosecution's case falls far short of requirements of prima facie case — Whether conviction and sentence safe — Dangerous Drugs Act 1952 s 39B(2) — Evidence Act 1950 s 17*
E

Evidence — Confession — Admissibility of confession — Conduct — Appellant's conduct — Leading to discovery of hidden drugs — Whether amounts to confession — Statutory caution not given to appellant — Whether F *evidence amounted to inadmissible confession — Whether trial judge erred by admitting evidence of appellant's conduct that led to discovery of hidden drugs — Evidence Act 1950 ss 8 & 17*

G This was an appeal against the conviction of the appellant for trafficking of 7,587g of cannabis for which he was sentenced to death. In this case, a police raid led by SP3 was made in respect of a house at Parit Buntar, Perak. As the front door was not locked, the police team entered the house wherein they found three males of the Malay race seated at the hall area. After informing the three persons that they are police officers, SP3 and his team searched their H bodies and the house. From the search, SP3 recovered a transparent plastic packet containing compressed lumps suspected to be *ganja* on the floor to the right of where the accused (Adenan) was seated. A transparent plastic packet containing substance suspected to be *ganja* was also found in the front left jeans pocket of Termizi, one of the three males. The third male, Muzamir bin Hassan I ('SP7'), was searched and the police team found one transparent plastic packet containing substance suspected to be *ganja* from the folds of the *sarung* worn by him. Further, the appellant, allegedly without any inducement or otherwise by SP3, led SP3 to a bedroom on the ground floor of the house and took out a black plastic package from a cupboard and gave it to SP3 who then found three

compressed slabs of dried leaves suspected to be *ganja*. SP3 then searched the room and recovered a bag from the same cupboard. That bag was then opened in front of the appellant and found to contain seven compressed slabs of dried leaves wrapped with transparent plastic suspected to be *ganja*. SP2, the chemist, confirmed that the items recovered were cannabis with the weight of 7,587g. The learned judicial commissioner found the appellant had a prima facie case of trafficking to answer in that he had exclusive possession of the illicit drugs and hence called upon the appellant to enter his defence. Before this court, the appellant from the outset submitted that the prosecution had failed to prove that the appellant had exclusive possession of the drugs.

Held, allowing the appeal and setting aside the conviction and sentence:

(1) The appellant's conduct in leading SP3 to the hidden drugs provides a strong inference that he had exclusive possession of and knew the nature of the dangerous drugs. The appellant's conduct inferred only one thing and that it was a confession of the offence of trafficking. It cannot be doubted that confession can come in many forms. Written and oral statements are but some of the forms. There was no reason why conducts such as that of the appellant in this case could not be a confession of the crime. Hence, the appellant's leading SP3 was a confession under s 17 of the Evidence Act 1950 ('the Act') (see paras 17 & 20).

(2) As no statutory caution had been given to the appellant, the discovery of the drugs was inadmissible in law. The fact that there was no evidence as to what was said to the appellant prior to his conduct led the court in a realm of speculation. It was not natural for anyone to voluntarily lead to a discovery of the drugs without any prompting from anyone. In this case, it was not known whether there was any inducement by SP3 or anyone else. Unfortunately, the lack of evidence on this aspect left the court full of doubts (see para 21).

(3) Although s 8 of the Act which in effect allows conducts of accused to be admissible as evidence to prove any relevant fact, however, once that conduct amounts to a confession, the court must then consider whether the statutory caution was given and whether the confession was voluntary (see para 22).

(4) As the learned judicial commissioner did not evaluate the evidence to determine whether the prosecution had proven its case beyond reasonable doubt in the manner as set-out in this case, it was wrong to call the appellant to enter his defence as the prosecution had failed to prove its case to the standard as set-out above. In short, without the appellant's confession by conduct, the prosecution's case fell far short of the requirements of a prima facie case (see para 24).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap sabitan perayu atas pengedaran sebanyak 7,587g kanabis yang mana dia telah dihukum mati. Dalam kes ini, serbuan polis diketuai oleh SP3 dibuat berkenaan sebuah rumah di Parit Buntar, Perak. Memandangkan pintu depan tidak berkunci, pasukan polis telah memasuki rumah tersebut yang mana mereka mendapati tiga orang lelaki berbangsa Melayu duduk di kawasan ruang tamu. Selepas memaklumkan kepada tiga orang tersebut bahawa mereka adalah pegawai polis, SP3 dan pasukannya telah memeriksa badan mereka dan rumah tersebut. Daripada pemeriksaan itu, SP3 mendapati satu paket plastik lutsinar berisi ketulan mampat disyaki ganja di atas lantai di sebelah kanan di mana tertuduh (Adenan) duduk. Sepaket plastik lutsinar mengandungi bahan disyaki ganja turut ditemui dalam poket hadapan kiri jeans daripada Termizi, salah satu daripada tiga lelaki. Lelaki ketiga, Muzamir bin Hassan ('SP7'), telah diperiksa dan pasukan polis mendapati satu bahan plastik yang mengandungi paket lutsinar disyaki ganja dari lipatan sarung yang dipakai olehnya. Seterusnya, perayu, dengan dakwaan tanpa apa-apa dorongan atau selainnya oleh SP3, membawa SP3 ke bilik tidur di tingkat bawah rumah dan mengeluarkan bungkusan plastik hitam dari almari dan memberikannya kepada SP3 yang kemudian mendapati tiga papak daun kering dimampatkan disyaki ganja. SP3 kemudian menggeledah bilik dan mendapati satu beg dari almari yang sama. Beg itu kemudian dibuka di hadapan perayu dan didapati mengandungi tujuh papak daun kering mampat yang dibalut dengan plastik lutsinar disyaki ganja. SP2, ahli kimia, mengesahkan bahawa item yang dijumpai adalah ganja dengan berat 7,587g. Pesuruhjaya kehakiman yang bijaksana mendapati perayu mempunyai kes prima facie pengedaran untuk menjawab bahawa dia mempunyai milikan eksklusif terhadap dadah haram dan dengan itu perayu dipanggil untuk membela diri. Di hadapan mahkamah ini, perayu dari awal lagi mengemukakan, pihak pendakwaan gagal membuktikan bahawa perayu mempunyai milikan eksklusif terhadap dadah.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) Kelakuan perayu dalam membawa SP3 kepada dadah tersembunyi memperuntukkan inferens kuat bahawa dia mempunyai milikan ekslusif dan mengetahui sifat dadah berbahaya. Kelakuan perayu menunjukkan hanya kepada satu perkara iaitu pengakuan salah kepada kesalahan pengedaran. Ia tidak boleh diragukan bahawa pengakuan salah boleh datang dalam pelbagai rupa. Kenyataan bertulis dan lisan adalah beberapa bentuk tersebut. Tiada sebab mengapa kelakuan seperti itu oleh perayu dalam kes ini tidak boleh menjadi pengakuan salah terhadap jenayah tersebut (lihat perenggan 17 & 20).

(2) Oleh kerana tiada amaran berkanun telah diberikan kepada perayu, dapatan terhadap dadah tersebut tidak boleh diterima dalam

undang-undang. Fakta bahawa tiada keterangan kepada apa yang dikatakan kepada perayu sebelum kelakuannya membawa mahkamah kepada dunia spekulasi. Ia adalah tidak semula jadi untuk sesiapa untuk secara sukarela membawa kepada dapatan dadah tanpa apa-apa dorongan daripada sesiapa. Dalam kes ini, ia tidak diketahui sama ada terdapat dorongan oleh SP3 atau orang lain. Malangnya, kekurangan keterangan dalam aspek ini meninggalkan mahkamah penuh dengan keraguan (lihat perenggan 21).

(3) Walaupun s 8 Akta yang mana berkuat kuasa membolehkan kelakuan daripada boleh diterima sebagai keterangan untuk membuktikan apa-apa fakta yang berkaitan, bagaimanapun, sekali kelakuan itu terjumlah kepada pengakuan salah, mahkamah kemudian perlu mengambil kira sama ada amaran berkanun diberikan dan sama ada pengakuan itu adalah sukarela (lihat perenggan 22).

(4) Oleh kerana pesuruhjaya kehakiman yang bijaksana tidak menilai keterangan untuk menentukan sama ada pendakwaan telah membuktikan kes mereka melampaui keraguan munasabah mengikut cara yang dinyatakan dalam kes ini, ia adalah salah untuk memanggil perayu untuk memasukkan pembelaannya kerana pendakwaan gagal untuk membuktikan kesnya mengikut standard yang telah dinyatakan. Pendek kata, tanpa pengakuan salah perayu melalui kelakuan, kes pendakwaan tidak memenuhi kehendak kes prima facie (lihat perenggan 24).]

Notes

For cases on admissibility of confession, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 906–912.

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 763–910.

Cases referred to

Collins and others v R (1980) 31 ALR 257, FC (refd)

Pendakwa Raya v Mohd Radzi bin Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457, FC (refd)

PP v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (folld)

Legislation referred to

Criminal Procedure Code ss 182A

Dangerous Drug Act 1952 s 37A(1)

Evidence Act 1950 ss 8, 17, 27

Appeal from: Criminal Trial No 45A–06 of 2009 (High Court, Ipoh)

Gurbachan Singh (Charan Singh with him) (Nurul & Charan) for the appellant.

Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the conviction of the appellant for trafficking of 7,587g of cannabis on 30 April 2009, for which he was sentenced to death.

[2] On 9 January 2014, we heard the appeal and after hearing submissions from learned counsel and deputy public prosecutor we allowed the appeal and now give our grounds for that decision.

CASE FOR THE PROSECUTION

[3] A police raid led by Inspector Sofian bin Kasudin ('SP3') was made on 30 April 2009 at about 10pm in respect of a house at Pt Sg Setar, Parit Buntar, Perak. As the front door was not locked, the police team was able to enter the house with ease and upon entering they found three males of the Malay race seated at the hall area. After informing the three persons that they are police officers, SP3 and his team searched their bodies and the house.

[4] From the search, SP3 recovered a transparent plastic packet containing compressed lumps ('ketulan mampat') suspected to be *ganja* on the floor to the right of where the accused ('Adenan') was sitting.

[5] One of the three males by the name of Mohammad Termizi bin Yeop Ahmad ('Termizi') was searched by one D/Kpl Maniam and from the search a transparent plastic packet containing substance suspected to be *ganja* was found in his front left jean pocket.

[6] The third male by the name of Muzamir bin Hassan ('SP7') was searched by one D/Kpl Zambri who discovered and found one transparent plastic packet containing substance suspected to be *ganja* from the folds of the *sarung* worn by him.

[7] What happened after that is that the appellant allegedly without any encouragement or otherwise by SP3, led SP3 to a bedroom on the ground floor of the house and took out a black plastic package from a cupboard and gave it to SP3 who then found three compressed slabs of dried leaves suspected to be *ganja*. SP3 then searched the room and recovered a bag from the same cupboard. That bag was then opened in front of the appellant and found to contain seven compressed slabs of dried leaves wrapped with transparent plastic

suspected to be *ganja*. The appellant then was issued with a search list by SP3 and also surrendered the house key and electricity bill to SP3.

[8] 'SP2' the chemist was called to testify as to the nature of the items recovered from the bedroom in the ground floor. He confirmed that it was him who did the analysis on the seven compressed slabs found in the bag and the three slabs found in the black plastic to be cannabis with weight of 7,587g.

HIGH COURT DECISION

[9] The learned judicial commissioner correctly approached the case by first determining whether the appellant had exclusive possession of the drugs. On this element, the learned judicial commissioner relied on the Federal Court judgment in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209 where at pp 201–201 (MLJ); pp 217–218 (CLJ), it states:

> It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, — that is, 'exclusive' — that a conviction is possible. When the learned trial judge said 'The accused sought to negative the proof of exclusive possession …', we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.
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> [17] The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] 1 MLJ 28; [1955] 1 LNS 53:
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> > … It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
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> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.
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> [18] Thomson J, in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17, said that 'possession' for the purposes of criminal law involves possession itself — which some authorities term 'custody' or 'control' — and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th Ed, p 304), in which the exclusive element mentioned by Taylor J appears: A moveable thing is said to be in the possession of a person when

A he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not B exclusive possession. So much for exclusive possession.

[10] Applying the principles to the facts before her, she found as follows:

Nonetheless it was pertinent SP3's testimony that the black plastic bag (P5A(1)) was C handed over to him by the accused himself in the ground floor bedroom was not challenged at all in cross-examination and this was clearly not omitted in P18 particularly. Besides, SP3 explained under cross that although he did not state in detail in P18, he did so when his statement was eventually recorded by the investigating officer.

D In this context I did not consider the omission (about Adenan taking P5A(1) and P5A(2) from the cupboard) to be fatal to the prosecution case in the face of direct and unrebutted evidence of Adenan handing over P5A(1) and P5A(2) to SP3.

On this aspect of the prosecution evidence, learned defence counsel cursorily touched on the failure to administer a caution under s 37A of the Dangerous Drugs E Act and the application of s 27 of the Evidence Act vis a vis leading to the discovery of the drugs. The prosecution took the stand (which I was inclined to agree with) that it did not adduce any evidence to admit any such statement made by Adenan after his arrest that necessitated a caution under s 37A. Neither did it rely on any information received from or statement made by Adenan leading to the discovery of the proscribed drugs. It was the case for the prosecution that it was Adenan who had F led SP3 to the bedroom from where he took P5A(1) and P5A(2) and handed over to SP3. No statement was needed to be relied upon to prove this leading by Adenan to the room from where he took out the said exhibits, hence there was no indication by the prosecution that it was relying on s 27 of the Evidence Act. Similarly, this was the situation in *Public Prosecutor v Denish Madhavan* [2010] MLJU 447; [2010] 5 G CLJ 635 where the Federal Court held in dismissing an application by the accused for his conviction by the Federal Court to be reviewed (the Federal Court having reversed the decision of the Court of Appeal which substituted conviction under s 39B(2) of the Dangerous Drugs Act by the High Court with a conviction for possession under s 39A(2)):

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> (2) A party adducing evidence need not at every stage of the trial indicate as to which provision in the Act he is relying upon. He does so only if there is an objection as to the admissibility of any statement or evidence. Otherwise, the trial will never be able to progress. Section 27(1) of the Act allows a statement made while the accused is in custody to be admissible if I it leads to the discovery of any fact although it amounts to a confession. The judgment of the Federal Court judge pointed out that it was the accused who brought out the bags containing the cannabis from under the bed. No statement needed to be relied upon to prove this leading by the accused to the bags found. If counsel did not recognise under which provision the evidence was adduced, then it was his fault.

The Federal Court in hearing the appeal by the prosecution in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209 took a step further in deciding on p 203 (MLJ); p 220 (CLJ):

> We will go a step further and say that, even were the respondent's statement to be overlooked, the fact that the respondent, in the circumstances that obtained, brought out from under the bed the bags containing the cannabis was itself sufficient as complete and direct proof that he had knowledge of the existence of the cannabis in the bags and was therefore in possession of it. With such proof of knowledge, it is unavailing as a defence to suggest that the presence of the cannabis in the respondent's bags was the result, unknown to the respondent, of the work of someone who had access to the house and the respondent's room.

In the same manner, the circumstances of Adenan leading SP3 to the room from where P5A(1) and (2) were taken directly showed that Adenan had knowledge of the whereabouts and existence of the cannabis in P5A(1) and was in possession thereof. His learned counsel did not raise any objection to SP3's testimony that Adenan led him to the only bedroom on the ground floor from where he took P5A(1) and (2) before handing over to him. Learned counsel only objected to the part when SP3 was about to testify with regard to his question to the accused as to who was the owner of the house to which the learned deputy passed over as inadmissible after it was revealed that the question was posed after the accused was arrested.

[11] Premised on her findings, the learned judicial commissioner found the appellant had a prima facie case of trafficking to answer in that he had exclusive possession of the illicit drugs and hence called upon the appellant to enter his defence.

GROUNDS OF APPEAL

[12] Learned counsel for the appellant from the outset submitted that the prosecution had failed to prove that the appellant had exclusive possession of the drugs. The first matter which we feel we have to determine is whether or not the appellant was arrested prior to leading SP3 to the room with the drugs. To the credit of the learned DPP, it was conceded that the Appellant was under arrest at that point in time. That being the case, it is also conceded by learned DPP that the appellant was entitled to be given the statutory caution as required by law, that is, anything which he may say may be used against him at the trial. The relevant statutory provision is found in s 37A(1) of the Dangerous Drug Act which reads as follows:

> (1) Where any person is charged with any offence against this Act any statement, whether such statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by such person to or in the hearing of any police officer of or above the rank of Inspector or any senior officer of customs and whether or not interpreted to

him by any other police officer or senior officer of customs or any other person concerned or not in the arrest, shall notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that no such statement shall be admissible or used as aforesaid —

(a) if the making of the statement appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the Court to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(b) in the case of a statement made by such person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect —

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him.

(3) Where a statement is purported to be made by a person charged with an offence against this Act under and in accordance with section 113 of the Criminal Procedure Code, the statement so made shall be deemed to have been made under and in accordance with this section.

[13] Again to the credit to the learned DPP, it was conceded that no such caution was given by SP3 or by anyone else. The consequence of such omission is simply that whatever statements made by the appellant is inadmissible. The evidence of the prosecution from SP3 is simply that the appellant without any prompting by anyone led him to the room. The question which confronts us is whether this is a reasonable inference to make.

[14] The learned judicial commissioner simply states that the circumstances of the appellant leading SP3 to the room showed that he had knowledge of the whereabouts and existence of the cannabis and was in possession thereof. The only evidence before the court on this issue is from PW3 which is this:

> ... telah membawa saya (SP3) bersama D/S/lnsp Zulkfli dan D/KPL Zambri ke bilik tidur bahagian bawah rumah di mana suspek telah mengambil satu bungkusan plastic berwarna hitam dan menyerahkannya kepada saya dengan tangan kanannya.

[15] The Learned DPP submitted that the prosecution is not relying on s 27 of the Evidence Act in respect of the discovery of the drug in the ground floor bedroom. This submission was accepted by the learned judge and rightly so as there is no information given by the appellant as required for the application of s 27 of the Evidence Act. If that is the case, we ask under what provision of law is the evidence of the 'act of leading to the discovery of the drugs' by the appellant admitted by the learned judicial commissioner.

[16] Before we deal with that question, we must determine what the consequence of the appellant's act is. The learned judicial commissioner in fact had answered that question when she held that as follows:

> ..., the circumstances of Adenan leading SP3 to the room from where P5A(1) and (2) were taken directly showed that Adenan had knowledge of the whereabouts and existence of the cannabis in P5A(1) and was in possession thereof.

There is little doubt as stated above that the learned judicial commissioner premised on that evidence to conclude that the prosecution had proved a prima facie case.

[17] It is our view that the learned judicial commissioner then should have considered whether that conduct of the appellant could amount to a confession. We agree with the learned judicial commissioner that the appellant's conduct in leading PW3 to the hidden drugs provide a strong inference that he had exclusive possession of and knew the nature of the dangerous drugs. In our view the appellant's conduct infer only one thing and that is it is a confession of the offence of trafficking.

[18] We are fully aware that confession by conduct is not provided for under s 17 of the Evidence Act which reads as follows:

> (1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.
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> (2) A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.
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> (3) Subsection (2) shall have no application in Sarawak.

The above section talks of oral or written statements which in our view do not encompass conducts.

[19] In *Collins and others v R* (1980) 31 ALR 257, the Federal Court of Australia held that the conduct of the accused in a re-enactment of the crime arranged by the police is evidence of admission by the accused and rejected the same on the ground that it was not done voluntarily. The Federal Court had treated the accused's conduct amounting to a confession of the crime charged

and since the confession by conduct was not done voluntarily, the Federal Court rejected the same.

[20] We see merit in the approach of the Australian jurisdiction. It cannot be doubted that confession can come into many forms, written and oral statements are but some of the forms. We see no reason why conducts such as that of the appellant in this case cannot be a confession of the crime. Hence we accordingly find that the appellant's leading SP3 was a confession.

[21] As no statutory caution had been given to the appellant, we are left with no option but to rule that the discovery of the drugs is inadmissible in law. We further say that the fact that there is no evidence as to what was said to the appellant prior to his conduct leads this court in a realm of speculation. We find that it is not natural for anyone to voluntarily lead to a discovery of the drugs without any prompting from anyone. In the case before us, was there any inducement by SP3 or anyone else. Unfortunately the lack of evidence on this aspect leaves us full of doubts.

[22] We are fully aware of s 8 of the Evidence Act 1950 which in effect allows conducts of accused to be admissible as evidence to prove any relevant fact. However we find that once that conduct amounts to a confession, the court must then consider whether the statutory caution was given and whether the confession was voluntary.

[23] The Federal Court in *Pendakwa Raya v Mohd Radzi bin Abu Bakar* [2005] MLJU 504; [2006] 1 CLJ 457 had held that at the end of the prosecution's case, the court must ensure that the evidence after maximum evaluation is at such a level that if the accused remains silent the court must be willing to convict before defence is called. In another word the court must notionally presume that the accused had remained silent and as such also notionally treat the trial had ended. By virtue of that approach the court also cannot review the prosecution's evidence if the accused chose to remain silent as was done by the court prior to the maximum evaluation approach. The law is clear as to what the standard of proof is when the trial has ended and that is for the court to convict, the prosecution must have proved its case beyond reasonable doubt. This is what s 182A of the Criminal Procedure Code says:

> 182A Procedure at the conclusion of the trial.
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> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the Prosecution has proved its case beyond reasonable doubt.
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> (2) If the Court finds that the Prosecution has proved its case beyond reasonable doubt, the Court shall find the Accused guilty and he may be convicted on it.

(3) If the Court finds that the Prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

Hence it is our view that the learned judicial commissioner must at the end of the prosecution case, determine whether the prosecution had proven its case beyond reasonable doubt.

[24] As the learned judicial commissioner did not evaluate the evidence in the manner as set-out above, we are of the considered view that it was wrong to call the appellant to enter his defense as the prosecution had failed to prove its case to the standard as set-out above. In short, without the appellant's confession by conduct, the prosecution's case falls far short of the requirements of a prima facie case.

CONCLUSION

[25] For reasons stated above, we allowed the appeal and set aside the conviction and sentence of the learned judicial commissioner. The appellant is thus discharged and acquitted of the charge of trafficking.

Appeal allowed; conviction and sentence set aside.

Reported by Ashgar Ali Ali Mohamed